No. 82-1565

In The

Supreme Court of the United States

October Term, 1983

BACCHUS IMPORTS, LTD., and
EAGLE DISTRIBUTORS, INC.,

Appellants,

v.

GEORGE FREITAS, DIRECTOR OF TAXATION
STATE OF HAWAII,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION

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STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the Commission) is the official administrative agen-

[1]This brief is submitted by the Multistate Tax Commission in support of the Appellee. The parties have consented to the filing of this brief and a letter so indicating has been filed with the Clerk of the Court.

cy of the Multistate Tax Compact entered into currently by 20 states and the District of Columbia as full members and by 10 states as associate members.[2]

The Commission and its member states are concerned with the position of the Appellants and their *amicus*, Distilled Spirits Counsel of the United States and the Wine Institute, that the Court should declare unconstitutional the Hawaii Liquor Tax Law (Hawaii Rev. Stat. § 244) in *total* and refund a vast amount of liquor taxes to Appellants and other wholesalers which they have passed on to their purchasers. They are likewise concerned with the argument that any exemption from taxation to encourage the development of local industry, is invalid *per se* because of *presumed* (not proven) impact of such exemptions on interstate or foreign commerce.

The Appellants confuse the legitimate interest of the states to promote a local industry—a permissible state purpose—with a purpose to burden interstate or foreign commerce by imposing discriminatory taxation on such commerce. The Commission and its member states believe that such argument ignores the broad powers given the states under the Twenty-first Amendment to regulate and control liquor traffic and use within their respective borders. Most of the states, in conformity with prior Twenty-first Amendment decisions of the Court, enacted

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[2]The constitutionality of the Compact was upheld by the United States Supreme Court in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), *aff'g* 417 F. Supp. 795 (S.D.N.Y. 1976). The Court there noted that the Compact "symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both state and taxpayer." *Id.* at 456.

liquor legislation which is inconsistent with the position advanced here by Appellants and their *amici*.

Appellants and their *amici* ignore the facts and circumstances of this case. They claim discrimination as a matter of constitutional law by application of the protectionist *per se* rule without any showing that there is discrimination as a matter of fact. While the promotion of a small segment of a local liquor industry by granting a temporary tax subsidy could be characterized as protectionist legislation, it is not *per se* invalid since neither its purpose nor effect is to discriminate against competing out-of-state products or businesses. Furthermore, the liquor tax was not imposed because of the out-of-state origin of the liquor. The Hawaii Liquor Tax Law makes no such distinction. We thus do not believe that Appellants can rely on the protectionist *per se* rule to escape the factual realities of this case. As indicated in the Brief of the Appellee, the Appellants have not shown any damages to them, the liquor industry, or interstate or foreign commerce by the presence of the exemptions of okolehao and pineapple wine in the Liquor Tax Law for a limited time. Neither have they shown that they have shouldered the economic burden of the liquor excise tax.

The Court should grant the relief prayed for by Appellee in its brief. If the Court considers the merits of this case, it should affirm the opinion of the Hawaii Supreme Court. In its opinion, the Hawaii Supreme Court found that the tax in question was valid because the exemptions in question were enacted by the Hawaii legislature to serve a legitimate state interest and Appel-

lants had not shown that the exemptions adversely impacted their businesses or interstate or foreign commerce.

This brief is filed in support of that opinion and the position of the Appellee as set forth in his Brief.

SUMMARY OF ARGUMENT

The Hawaii Supreme Court held that the exemptions in question were valid under the Equal Protection, Import-Export and Commerce Clause provisions of the United States Constitution.[3]

In its equal protection analysis, by reliance on prior decisions of this Court (Jur. Stmt., App. A at A-7-16) the Hawaii Supreme Court found that the exemptions were granted for a legitimate legislative purpose (*Id.* at A-16). Since the products in question were exempted to promote a local industry and not to erect any trade barriers, it is evident that the exemptions were for a legitimate local purpose. In addition, the Hawaii Supreme Court found that the Hawaii Liquor Tax applied equally to all persons (wholesalers) in the same class as Appellants (*Id.* at A-11). While Appellants challenge this conclusion by arguing that this case involves *product*

[3]The Hawaii Supreme Court did not consider whether the Appellants were entitled to the refund of liquor taxes paid, whether they had standing, whether the exemptions were severable from the rest of the Liquor Excise Tax, or whether any decision on the merits, if favorable to the Appellants, should be given only prospective application. As indicated in the Brief of the Appellee, these issues require resolution for proper disposition of this case.

discrimination (Appellants' Brief at 23-24), they have failed to allege or prove that okolehao or pineapple wine, *as products,* compete with any imported products whatsoever and particularly with their own imported products (beer and grape wine). Inasmuch as the products in question were not favored over competing out-of-state products of like kind, their exemption could have no discriminatory effect on either interstate or foreign commerce. The exemptions in question would have had the same practical operation and effect if the Hawaii legislature had simply exempted from the excise tax *all* okolehao or pineapple wine, wherever manufactured or produced. Thus the equal protection analysis and conclusions of the Hawaii Supreme Court are valid in every respect. This conclusion is further amplified and supported by the Brief of the Appellee.

The Hawaii Supreme Court correctly disposed of the Import-Export question raised by Appellants. The tax in question is clearly an excise tax on the sale of liquor. It is not an import duty; nor is it a tax on importation into Hawaii. The tax attaches only when liquor enters into the local market for sale, use, or consumption. The tax does not attach to liquor destined for delivery or consumption elsewhere. The tax does not discriminate against imported goods either by design or actual effect (*Id.* at A-21).

With respect to the Commerce Clause, the Hawaii Supreme Court considered the practical effect of the challenged Liquor Excise Tax Law in light of the standards set forth by this Court in *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977) (*Id.* at A-21-30). In *Complete Auto,* this Court held that a state tax does not

offend the Commerce Clause if it is applied to an activity with a substantial nexus within the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State (430 U.S. at 279; *id.* at A-23). Of these tests, the only one seriously relied on by Appellants and meriting any attention is the test pertaining to discrimination. As to the discrimination issue, the Hawaii Supreme Court, after analyzing the cases relied upon by Appellants, concluded "that the Appellants had failed to demonstrate that the Hawaii Liquor Tax in its practical operation works discrimination against interstate commerce." (*Id.* at A-30.) In support of this statement it noted in footnote 21:

> Though the taxpayer submitted no evidence on the amount of okolehao and pineapple wine sold in Hawaii, we believe we can safely assume these products pose no competitive threat to other liquors produced elsewhere and consumed in Hawaii.

Id. at A-39.

Appellants do not challenge this conclusion, but rather argue that the entire Hawaii Liquor Tax is unconstitutional because two limited exemptions constitute protectionist *per se* legislation forbidden by the Commerce Clause. Appellants fail to understand the vast difference between (1) a statutory scheme to promote the development of a local industry which is nonexistent or is having financial difficulties by granting it a limited tax exemp-

tion, and (2) a statutory scheme designed to impose discriminatory taxes on interstate or foreign commerce.[4]

Appellants cite *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) and other similar cases which involve state taxes which discriminated against interstate commerce, whereas this case involves nondiscriminatory tax exemptions of unique local industries.

The Hawaii Supreme Court properly disposed of the Appellants' Equal Protection, Import-Export and Commerce Clause arguments. Its reasoning is based on the fact that the limited exemptions in question do not constitute protectionist *per se* legislation and do not burden or discriminate against interstate or foreign commerce.

ARGUMENT

I. Introduction to Argument.

This Brief is confined to the substantive merits of the case. We agree, however, with the Appellee's position that Appellants should not be unjustly enriched by the refund of any taxes in question; being entitled to

[4]Interestingly here, the persons sought to be protected by the Appellants are not the Appellants. Rather, it is the out-of-state producers of liquor which Appellants assume are disadvantaged by the exemption of okolehao and pineapple wine production in Hawaii. The record does not disclose the existence of any such producers. If it did, the Appellants cannot raise any discrimination or other issues pertaining to the legal rights of these producers.

no refund, there exists no case or controversy for adjudication by this Court. The Stipulation of Facts of Bacchus Imports, Ltd., Appellant, states:[5]

> 11. Plaintiff's "wholesale price" for wine and beer imported by it is determined by adding a percentage markup to its "landed cost" for such wine and beer. Plaintiff's landed cost for such wine and beer is determined by adding to its original cost in dollars the following costs:
>
> (1) Inland freight to the port of shipment to Honolulu;
>
> (2) Container and wharfage charges at the port of loading, as charged by the shipping company;
>
> (3) Ocean (or air, as the case may be) freight to Honolulu (including any currency adjustment fees added by the shipping company);
>
> (4) Wharfage fees at Honolulu;
>
> (5) Drayage charges for transportation to plaintiff's warehouse;
>
> (6) Customs brokerage fees;
>
> (7) Customs duties and internal revenue taxes as applicable; and
>
> (8) Warehouse handling charges.
>
> 12. Plaintiff sells wine and beer to licensees in the State of Hawaii at a price equal to its wholesale price as above determined, plus the twenty per cent tax imposed by Section 244-4 of the Liquor Tax Law, plus the one-half per cent tax imposed by Section 237-13 of the said Hawaii Revised Statutes.
>
> 13. Sales to licensees are upon invoices due and payable in thirty days. Plaintiff is obligated by the

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[5]The Stipulation of Facts of Appellant, Eagle Distributors, Inc. is identical in substance.

> Liquor Tax Law to file its return and remit the twenty per cent tax on its taxable sales by the close of the month following the month for which sales are reported. The tax is due and owing whether or not plaintiff's customers have paid their invoices as of that date. A substantial number of plaintiff's customers take more than thirty days to pay their bills.

(*Id.* at 8-9).

These stipulations, coupled with Hawaii Rev. Stat. § 281-83, clearly demonstrate that the Appellants are neither entitled to a refund of taxes nor to adjudication of the constitutional issues which they seek to raise in this case.[6] This follows from the fact that Appellants have separately stated and passed the tax on to their purchasers (liquor retailers).

We also agree with the position of the Appellee that any decision invalidating discriminatory features of state regulation or taxation of the liquor industry or traffic, should be given only prospective application by this Court. Contrary to the Appellants' argument, as of this date, no decision of this Court has specifically invalidated all discrimination in this area. Rather, the Court has recognized that states have constitutional au-

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[6]84 C.J.S., Taxation, § 632; *State ex rel. Old Line Life Ins. Co. v. Olsness*, 63 N.D. 695, 249 N.W. 694 (1933); *Washington Plaza Associates v. State Bd. of Assessments Appeals*, 620 P. 2d 53 (Colo. App. 1980); *State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So. 2d 529 (Fla. 1973); *W. F. Monroe Cigar Co. v. Dep't of Revenue*, 50 Ill. App. 3d 161, 365 N. E. 2d 574 (1977); *Consolidated Distilled Products Inc. v. Mahin*, 56 Ill. 2d 110, 306 N. E. 2d 465 (1973), *appeal dismissed*, 419 U. S. 809 (1974); *United States v. Jefferson Electric Manufacturing Co.*, 291 U. S. 386 (1934); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982).

thority under the Twenty-first Amendment to regulate and tax liquor in a manner not permitted by other constitutional restraints applicable to other items of commerce.

II. There is No Merit to the Appellants' Equal Protection Argument Because Hawaii is Entitled to Classify Liquor Products Differently for Taxation Purposes and All Persons in Appellants' Class Have Been Treated Alike.

The Equal Protection issue is properly analyzed in the Opinion of the Court below (Jur. Stmt., App. A-6-16). The only possible basis for the Appellants to contend that the exemption of okolehao and pineapple wine deny them equal protection would be that they are discriminated against as wholesalers because they are licensed to sell products that are taxed at a discriminatory rate as compared to products other wholesale licensees are selling. There is nothing to indicate that these are the facts of this case. The fact that the Hawaii legislature exempted okolehao and pineapple wine from the Liquor Excise Tax law does not support the conclusion that the law discriminates against the Appellants. Yet, that is the sole basis on which Appellants base their discrimination argument.

III. There is No Merit to the Appellants' Import-Export Clause Argument Because the Liquor Excise Tax Is On a Local Incident (Sale) After Importation and the Liquor Tax Does Not Discriminate Against Foreign Commerce.

In advancing their Import-Export as well as foreign commerce argument (Appellants' Brief 21-29), the Appellants inappropriately assume that the Hawaii Liquor

Tax is based on "taxing imports on the basis of their origin" (*Id.* at 24). However, the Hawaii Supreme Court noted as follows:

> Hawaii's tax on wholesaling activity applies to all liquor wholesalers engaged in business in the States. It touches all local sales and uses of liquor produced in foreign countries, in the mainland States, and in Hawaii, with the exception of okolehao and pineapple wine. There is absoluutely no indication that it has been applied selectively to discourage imports in a manner consistent with foreign policy. Nor is there a scintilla of evidence that it has the effect of a protective tariff *or that it has any substantial indirect effect on the demand for imported liquor.* And no reason whatsoever to consider the limited exemption a threat to the federal treasury appears. . . .

Jur. Stmt., App. A-21 (emphasis added; footnotes omitted).

As further noted by the Hawaii Supreme Court:

> The legislature's reason for exempting "ti root okolehao" from the "alcohol tax" was to "encourage and promote the establishment of a new industry," S.L.H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87, in 1960 Senate Journal, at 224, and the exemption of "fruit wine manufactured in the State from products grown in the State" was intended "to help" in stimulating "the local fruit wine industry." S.L.H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408-76, in 1976 Senate Journal, at 1056. No one could quarrel with the proposition that the promotion of domestic industry is a legitimate state purpose.

Id. at A-12-13 (footnote omitted).

As the foregoing extracts from the Hawaii Supreme Court's Opinion indicate, the Hawaii Liquor Tax is not imposed on liquor because of its foreign origin. The

liquor tax applies to all sales in Hawaii regardless of their origin with the exception of two unique products which amount to a very small fraction of total sales irrespective of their origin. In the year 1976 (the year the exemptions were enacted), the exempted products amounted to only 3.7 per cent of total liquor produced in Hawaii. Appellants' Import-Export and Foreign Commerce Clause argument would have some validity only if they imported okolehao or pineapple wine, which was subject to discriminatory taxes. On the record, and to our knowledge, no such products are produced elsewhere, and therefore, none could have been the subject matter of discrimination. As noted by the Hawaii Supreme Court in its Opinion: "We . . . have good reason to believe neither okolehao [nor] pineapple wine is produced elsewhere." Jur. Stmt. at A-39.[7]

The Hawaii Liquor Tax Law was first enacted in 1939 to regulate, control, and tax the liquor industry in Hawaii. The Committee Report there noted:

> Your Committee, after studying the problem of the effects of liquor in relation to the cost to government, feels that the cost of government is materially increased due to liquor, and that the establishment of a liquor tax is fair and equitable. Statistics bear out the fact that the costs of police, institutions and some other branches of the government have been greatly increased due to liquor. Your Committee feels that the revenues from a liq-

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[7]In cases relied upon by the Appellants such as *Cook v. Pennsylvania*, 97 U. S. 566 (1878); *Welton v. Missouri*, 91 U. S. 275 (1878); and *Brown v. Maryland*, 25 U. S. 12 (Wheat.) 419 (1827) goods were in fact subject to discriminatory taxation because of their foreign origin. The Hawaii Liquor Tax makes no such distinction.

> uor tax should be divided between the Territory and the counties inasmuch as the increased costs of government due to liquor accrue to the counties as well as the Territory.

1939 Hawaii H.J. at 1023.

Based on the foregoing, it is totally unreasonable to conclude that the tax in question is imposed on imported liquors "because of their foreign origin." Rather, the tax is imposed as a general revenue measure on all liquor sold in Hawaii. The exemption of two unique Hawaiian products does not change the true nature of the Hawaii Liquor Tax Law one *iota*. It is still a general revenue law.

IV. There is No Merit to the Appellants' Commerce Clause Argument Because the Practical Operation and Effect of the Exemptions In Question Does Not Result In Any Discrimination Against Either Interstate or Foreign Commerce.

In *Arkansas Elec. Co-op. Corp. v. Arkansas Public Comm'n*, — U.S. — 103 S. Ct. 1905 (1983), this Court noted:

> ". . . [T]he general trend of our modern Commerce Clause jurisprudence [is] to look in every case to 'the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.' 314 U.S., at 505. ". . . But in any event it [modern jurisprudence in regard to the Commerce Clause] clearly recognizes . . . that there is 'an infinite variety of cases, in which regulation of local matters may also operate as a regulation of [interstate] commerce, [and] in which reconcilation of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and the national interests involved.'

> *Southern Pac. Co. v. Arizona ex rel Sullivan*, 325 U.S. 761, 768-69 . . . (1945). 103 S. Ct. at 1915. ". . . Thus, in recent years, this Court has explicitly abandoned a series of formalistic distinctions . . . which once both defined and controlled various corners of the Commerce Clause doctrine."

Id. at 1916.

In *United States Brewers Assoc., Inc. v. Healy*, 532 Fed. Supp. 1312 (1982), the Brewers Association challenged the constitutionality of Connecticut statute which required that brewers sell to Connecticut wholesalers at the lowest price the same item sold in a four state region. In rejecting the discriminatory purpose argument of the brewers, the Court noted:

> As mentioned above, there are no brewers or importers in Connecticut, so the statute could not possibly benefit local brewers. The statute mandates only that Connecticut wholesalers be treated as well as out-of-state wholesalers with respect to price. The legislative intent to secure "fairer" or "more equal" competition can hardly be characterized as "protectionist within the meaning of the Commerce Clause." Because neither the statute nor the legislative debates reveal an avowed purpose to discriminate against out-of-state businesses, the statute cannot be invalidated on the basis of its purpose alone.

532 Fed. Supp. 1312 at 1323.

We believe that footnote 42 (*id.*) of *Brewers* appropriately articulates the nature of the protectionist *per se* rule:

> While the Supreme Court has indicated that "economic protectionism" may be shown by "proof of either discriminatory effect, see *Philadelphia v. New Jersey*, 437 U.S. 617 [98 S.Ct. 2531, 57 L.Ed. 2d 475] (1978) or of discriminatory purpose, see *Hunt*

v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 352-353 [97 S. Ct. 2434, 2446-2447, 53 L.Ed. 2d 383] (1977)," *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 727 n. 15, 66 L.Ed. 659, it is hard to find a case where purpose alone has invalidated a statute. The citation to *Hunt v. Washington Apple* in support of the proposition that discriminatory purpose *alone* is sufficient for a finding that a state law is "protectionist" appears to be incorrect. In *Hunt*, the Court stated that

> we need not ascribe an economic protection motive to the North Carolina legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the market place.

Id. 432 U.S. at 352-53, 97 S.Ct. at 2446. It is reasonably clear from this quotation that *Hunt* did not involve a finding of discriminatory *purpose*, but rather rested on the existence of a discriminatory *effect*. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. at 351-52, 97 S.Ct., at 2445-2446. As the Court has recognized, it is a "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods. *Dean Milk Co. v. Madison*, 340 U.S. 349, 354, 71 S.Ct. 295, 298, 95 L.Ed. 329 (1951). Because states almost always can justify a particular statute, the Court, when considering the *purpose* of a challenged statute, will not be bound by "'[t]he name, description or characterization given it by the legislature or the Courts of the State,' but will determine for itself the practical *impact* of the law." *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed. 2d 250 (1979) (emphasis added), quoting *Lacoste v. Louisiana Dept. of Conservation*, 263 U.S. 545, 550, 44 S.Ct. 186, 188, 68 L.Ed. 437 (1924). Invariably the Court infers discriminatory *purpose* only when there is a

prior finding of discriminatory *impact*. The inquiry in each case requires first, a determination of whether a discriminatory effect exists, and second, an evaluation of the declared state purpose in light of the means chosen to attain it. Only where the discriminatory effect appears to stem primarily from a design to protect local interests and only secondarily from the pursuit of a legitimate state goal, has the Court inferred a "protectionist" purpose. The Court has rarely, if ever, invalidated a statute on the basis of a discriminatory purpose where there was not proof of actual or inevitable discriminatory effects. While the Court would be entitled to invalidate a statute with the avowed purpose of discriminating against interstate commerce on the assumption that it will have the desired effect, the opportunity rarely presents itself. As noted above, states are rarely so bold as to announce their intention to violate the Constitution, and the instant case is no exception to the rule.

Here the exemptions have neither discriminatory purpose or effect on interstate or foreign commerce. In addition, they have no known or measurable impact on interstate or foreign commerce. The only ascertainable purpose, effect or impact relates solely to promotion of a unique Hawaiian liquor industry.

Even though the protectionist *per se* rule is inapplicable here,[8] consideration of actual discrimination is still relevant. In arguing the *per se* rule and discrimination under the Commerce Clause, Appellants not only fail to

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[8]The Court has referred to the protectionist *per se* rule as "a virtually *per se* rule of invalidity." *Lewis v. BT Investments, Inc.*, 447 U. S. 27, 36 (1980). Appellants have dropped the word "virtually." Yet, the word virtually is important as an indication that facial discrimination must be examined in light of its purpose and its effect on interstate or foreign commerce.

note the absence of any discriminatory purpose or effect of the exemptions in question, but also the fact that there is no discriminatory taxation of products manufactured in another state. There is a substantial difference between the Hawaii Liquor Tax and discriminatory taxes involved in the cases relied upon by Appellants, such as *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) and *G.A.F. Seelig v. Baldwin*, 293 U.S. 163 (1934). In these cases the taxing scheme was specifically designed *to promote local businesses at the expense of competing out-of-state businesses.* This effect, purpose, and impact is lacking here. It is invalid to assume that commerce is burdened because the exemptions in question were enacted to promote unique local liquor industry. In any event, as noted in *Boston Stock Exchange*, ". . . [the] Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case." 429 U.S. at 329. As noted in *Seagram & Sons, Inc. v. Hostetter*, 384 U. S. 35 (1966), in commenting on Section 9, the price affirmation provision of a New York statute, it noted:

> "The serious discriminatory effects of Section 9 alleged by Appellants on their business outside New York are largely matters of conjecture . . . It will be time enough to assess the alleged extraterritorial effects of Section 9 when a case arises that clearly presents them."

384 U.S. 35 at 43.

We have no proof here of discriminatory effects as pertains to the exemptions in question and Appellants do not allege any. Discriminatory effects cannot be inferred here under the protectionist *per se* rule or otherwise. The liquor tax was not imposed and the exemptions were

not enacted to block or discriminate against the importation of liquor into Hawaii. Therefore, any Commerce Clause issue must go to the discriminatory effect. Since there is none, the Commerce Clause provision of the United States Constitution is not violated. This conclusion is substantiated by the Commerce Clause argument in the Appellee's Brief and the analysis of the same in the Opinion of the Hawaii Supreme Court.

V. Appellants' Argument That the Twenty-first Amendment is Neither Relevant Nor Controlling Here, Lacks Substance and Undercuts Their Commerce Clause and Import-Export Clause Arguments.

As noted by the Court in *Seagrams*:

> Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that:
>
> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." As this Court has consistently held, "That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories." *United States v. Frankfort Distilleries,* 324 U.S. Cf. *Nippert v. City of Richmond,* 327 U.S. 416, 425, n. 15, 66 S.Ct. 586, 590, 90 L.Ed. 760. Just two Terms ago we took occasion to reiterate that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 330, 84 S.Ct. 1293, 1297, 12 L.Ed. 2d 350. See *State Board of Equalization of California v. Young's Market Co.,* 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 1424; *Ziffrin, Inc. v. Reeves,*

308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128; *State of California v. State of Washington*, 358 U.S. 64, 79 S.Ct. 116, 3 L.Ed. 2d 106. Cf. *Indianapolis Brewing Co. v. Liquor Control Comm.*, 305 U.S. 395, 59 S.Ct. 256, 83 L.Ed. 246. As the *Idlewild* case made clear, however, the second section of the Twenty-first Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor. In *Idlewild* the ultimate delivery and use of the liquor was in a foreign country, and the Court held that under those circumstances New York could not forbid sales under the explicit supervision of the United States Customs Bureau, pursuant to laws enacted by Congress under the Commerce Clause for the regulation of commerce with foreign nations. Cf. *Dept. of Alcoholic Beverage Control for State of Cal. v. Ammex Warehouse Co.*, 378 U.S. 124, 84 S.Ct. 1657, 12 L.Ed. 2d 743; *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502.

> [3] Unlike *Idlewild*, the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. See *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032. No such situation is presented in this case. . . .

384 U.S. 35 at 41-43.

Seagrams and cases cited therein at least require the interest of Hawaii in enacting the exemptions to be viewed in light of their practical operation and effect on interstate or foreign commerce. When this is done, the protectionist *per se* rule (if otherwise applicable here)

is not controlling. The fact that the exemptions have no known impact or effect on interstate or foreign commerce is controlling.

CONCLUSION

The Commission and its member states, respectfully submit that this Court grant the relief requested by the Appellee in its Brief. It would be incongruous indeed if Appellants, in light of the Twenty-first Amendment, as heretofore interpreted and applied by this Court, on the basis of a protectionist *per se* rule, could obtain over $100 million dollars in refunds of liquor excise taxes where there is nothing in the record to show any injury to them or burden on interstate or foreign commerce.

Respectfully submitted,

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